Filed 3/30/05 P. v. Walker CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CURTIS WALKER, Defendant and Appellant.	B173175 (Los Angeles County Super. Ct. No. BA240795)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alice E. Altoon, Judge. Affirmed.

Ronnie Duberstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Marc J. Nolan and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

A criminal defendant, Curtis Walker, entered a negotiated plea of no contest to selling marijuana. (Health & Saf. Code, § 11360.) He was granted probation. Eight months later, he was arrested on a new charge of selling rock cocaine. In lieu of proceeding to trial on the new case, the People proceeded with the instant probation violation proceedings. At the probation violation hearing, an issue arose regarding the disclosure of the location of the covert surveillance post from which Los Angeles Police Officer Alex Pozo made his observations of the new, unrelated sale. The trial court upheld the People's assertion of the surveillance location privilege (Evid. Code, § 1040)[1] and ruled that the exact location of the observation post was not material to guilt. Then, based on appellant's commission of the new charge, it revoked probation and sentenced appellant to a two-year term in state prison.

Walker (appellant) appeals from the judgment entered following the revocation of probation. On appeal, he contends that after the trial court sustained the official information privilege, he was denied due process because it failed to strike Officer Pozo's testimony after it limited his cross-examination on the exact location of the observation post. In appellant's other contention, he asks this court to review the sealed in camera hearing proceedings to ensure that the trial court made the proper findings attendant to disclosure.

We find appellant's contentions to be without merit, and we affirm the judgment.

FACTS

1. The Summary of the Evidence at the Probation Violation Hearing.

The People requested probation revocation on only one theory -- that appellant was in violation of the terms and conditions of his probation because he had committed the new, unrelated offense of selling cocaine base. The evidentiary basis for the revocation was Officer Pozo's testimony at the preliminary hearing in the unrelated case and his testimony at the instant probation violation hearing.

---

[1] All further statutory references are to the Evidence Code unless otherwise indicated.

The evidence at the hearing established that on the afternoon of November 5, 2003, Officer Pozo and a partner arrived at a covert surveillance post in downtown Los Angeles. The surveillance post was across the street from the hamburger stand located on the east side of the street at 646 South Main Street. Officer Pozo explained that he and his partner were narcotic officers, and they were "monitoring" the area because that block is "plagued with narcotics sales."

As his partner set up, Officer Pozo saw appellant standing on the sidewalk in front of the hamburger stand. The officer saw a female, Brenda Sadler (Sadler), walking south. She approached appellant and the two conversed briefly. Then Officer Pozo observed an apparent hand-to-hand sale.

The officer described how he had observed appellant reach toward Sadler with his right hand. She met his hand with her left hand. When appellant's hand came away from Sadler's, Sadler's palm was open, and she peered into it. The officer could see a small, approximately 0.08 gram, off-white solid in her open palm. Sadler put the solid into her left sweater pocket. With her right hand, Sadler handed appellant some green items that looked like folded currency. Using his left hand, appellant took the green items and put them into his left jacket pocket. The officer made these observations through 8 x 25 high-powered binoculars with image stabilizers.

Based on the officer's knowledge and experience, the officer concluded that the off-white solid in Sadler's hand was rock cocaine and that the green items were United States currency.

Officer Pozo's partner radioed the chase team that a sales transaction had taken place, and appellant and Sadler walked northbound together. With Officer Pozo looking on from his surveillance post, the chase officers immediately detained and searched Sadler and appellant. The chase officers found a 0.09 grams of cocaine base in Sadler's left sweater pocket. In appellant's left jacket pocket, the chase officers found $46 in United States currency in small denominations.

During cross-examination, defense counsel asked Officer Pozo about the exact location of his observation post and whether he was looking out a building window.

To these questions, Officer Pozo asserted the privilege for official information. (§ 1040.) Notwithstanding the assertion of the privilege, the trial court permitted defense counsel to cross-examine the officer in general terms as to the location from which the officer saw the transaction. The officer disclosed that he was elevated 10 to 50 feet off the street and was approximately 60 to 80 feet from appellant and across the street. He said that he was looking at appellant's left side as appellant was facing in a northwesterly direction, and his angle to appellant was at 10 o'clock. The area was commercial. The officer made his observations between 3:00 and 3:30 p.m. Along the east side of the 600 block of South Main Street, there were several small trees. The officer testified that during the sale, his view was unobstructed. He explained that at that hour, along the street, there is pedestrian and vehicular traffic. However, he could only be vague with regard to where the pedestrians, parked cars, and motorists may have been during the transaction. Officer Pozo did not know whether his partner had observed the sale.

Appellant did not testify at the hearing or introduce evidence in defense.

2. The Trial Court's Ruling

After Officer Pozo completed his hearing testimony, the trial court spontaneously said, "I want to go in camera on your assertion of the privilege under 1040." In camera, the trial court asked the officer in detail about the reasons for his assertion of privilege. After examining the officer on the basis for his exercise of the privilege, the trial court continued the hearing in open court. The trial court announced, "I've made a finding where he doesn't need to disclose his location."

Defense counsel said in that event, he wanted to move to dismiss and to comment on materiality. Counsel argued that he was entitled to discover through cross-examination the location of the surveillance point so as to explore whether the officer was able to see what he claimed. He made a conclusory claim that the location of the observation post was material to the issue of guilt. He argued that the law required that if the trial court upheld the privilege, it was required to make an adverse finding in appellant's favor, and that the trial court's only option in this case was to dismiss the case. Counsel said to the trial court that "there were trees on the street somewhere

between three on each side for a total of six in the area," and argued that the evidence showed that there was pedestrian and vehicle traffic on the street that might have obstructed the officer's view. He asserted that "it doesn't appear" that the officer's view was "particularly clear" because the officer could not describe whether the green items in Sadler's hand were United States currency and the officer had indicated that he was not absolutely certain that the item in Sadler's hand was rock cocaine.

After listening to the defense argument, the trial court commented that it was not concerned with any remedy that flowed from a finding of materiality because it had not found materiality.

DISCUSSION

I. The Applicable Legal Principles

A. The General Standards For Determining Probation Revocation.

"[T]he superior court may revoke probation in the interests of justice if it has reason to believe that the probationer has committed other offenses. (Pen. Code, § 1203, subd. (a).) Revocation rests in the sound discretion of the court. Although that discretion is very broad, the court may not act arbitrarily or capriciously; its determination must be based upon the facts before it. [Citations.] [¶] . . . 'A court is justified in revoking probation even though the circumstances would not warrant a conviction.'" (*People v. Robart* (1973) 29 Cal.App.3d 891, 892-893.) The burden of proof for demonstrating a violation of probation is by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 446.)

In *Morrissey v. Brewer* (1972) 408 U.S. 471, 489, the United States Supreme Court held that the minimum due process requirements for a parole revocation hearing include the right to confront and to cross-examine adverse witnesses. In *People v. Vickers* (1972) 8 Cal.3d 451, 458, the California Supreme Court held that the minimal due process requirements of *Morrissey* are equally applicable to probation revocation cases. The court went on to note: "However, the precise nature of the proceedings for such revocation need not be identical if they assure equivalent due process safeguards."

(*People v. Vickers, supra*, at p. 458.) Hence, some flexibility in the manner in which due process guarantees are met is acceptable.

In *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 787, the United States Supreme Court also concluded that at a probation revocation hearing, the probationer must have the opportunity to confront and to cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation.

Where good cause is found for excusing cross-examination or confrontation, the reviewing court examines whether the trial court "'has reason to believe the facts disclosed by such sources.'" (*People v. Turner* (1975) 44 Cal.App.3d 753, 756.)

B. The Standards For Determining Whether Sanctions Apply After the People's Invocation of the Privilege For Official Information.

"A public entity has a privilege to refuse to disclose official information . . . if the privilege is claimed by a person authorized by the public entity to do so and: [¶] . . . [¶] (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . . ." (§ 1040, subd. (b)(2).) If the People's claim of official privilege is sustained in a criminal proceeding, the trial court "shall make such order or finding of fact adverse to" the People "as is required by law upon any issue in the proceeding to which the privileged information is material." (§ 1042, subd. (a).)

The People have a qualified privilege to withhold information concerning the exact location of a covert surveillance post, even where the eyewitness account of an officer situated in the post provides the sole basis for charges brought against the defendant at trial. (See generally *People v. Haider* (1995) 34 Cal.App.4th 661, 664-665 (*Haider*); *People v. Walker* (1991) 230 Cal.App.3d 230, 235-237 (*Walker*); *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1019 (*Montgomery*); *Bueno v. U.S.* (D.C. 2000) 761 A.2d 856, 857-858 (*Bueno*); *Anderson v. U.S.* (D.C.App. 1992) 607 A.2d 490 (*Anderson*).) The privilege was judicially created through analogous interpretations of *Roviaro v. United States* (1957) 353 U.S. 53, the United States case which established a qualified privilege for the government to withhold the identity of undercover informants.

(See *Anderson, supra*, 607 A.2d at p. 495; *Montgomery, supra*, 205 Cal.App.3d at pp. 1018-1019 [setting forth the history of the privilege in California].)

Law enforcement interests in surveillance positions are analogous to those concerning the disclosure of confidential informants. If an observation location becomes known to the public at large, its value to law enforcement will probably be lost. The revelation, moreover, may jeopardize the lives of police officers and of cooperative occupants of buildings. The privilege is conditional and is limited according to the fundamental requirements of fairness: where the disclosure of the covert surveillance post is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must give way. (See *Bueno, supra*, 761 A.2d at p. 858.)

The question in each case is whether fairness requires that the People's privilege must yield to the defense right to cross-examination. Whether a proper balance renders nondisclosure erroneous depends on the particular circumstances of each case, taking into account the crime charged, the possible defenses, the possible significance of the exact location of the surveillance post, whether the post is in continuing use, whether there are less drastic alternatives than a full disclosure, and other relevant factors. Given the circumstances, the trial court must balance the public interest in keeping the surveillance post secret against the defendant's right to cross-examine the police officers and exercise its sound discretion with regard to withholding the information. (*Montgomery, supra*, 205 Cal.App.3d at p. 1022; *Bueno, supra*, 761 A.2d at pp. 858-859.)

If the disclosure is unquestionably material to guilt and innocence and the assertion of the privilege is sustained, the trial court must make adverse findings to the People. If the People exercise the privilege, the trial court must impose appropriate sanctions to account for the inability of the defendant to cross-examine the officer about the location of his vantage point. (*Montgomery, supra*, 205 Cal.App.3d at pp. 1022-1023.)

The test of materiality is not simply relevance. To establish materiality, the defendant must show a reasonable possibility that disclosure would result in his

exoneration. The purpose of the defense learning the location of a covert surveillance point is to test the officer's observation of the sale. This is particularly important where there is only one witness to the sale and the defendant's guilt is otherwise uncorroborated, e.g., the purchaser is not detained and the sale is not photographed or otherwise memorialized. (*Montgomery*, *supra,* 205 Cal.App.3d at pp. 1022-1023.)

The rules for disclosure apply to probation revocation proceedings, as well as to jury trials. (See *People v. Goodlow* (1980) 101 Cal.App.3d 969, 977 [requiring informant disclosure proceedings during a probation revocation hearing].)

II. The Analysis

Appellant contends that the trial court erred when it found that cross-examination was not critical to his defense at the violation hearing. He asserts that the trial court's ruling on materiality and its refusal to strike the officer's direct testimony entitles him to a reversal of the judgment and to an order requiring the trial court to dismiss the probation violation proceedings with prejudice.

We disagree.

When we examine the substance of the officer's testimony and the facts that defense counsel elicited from the officer during cross-examination, we find no demonstration of materiality.[2] Where the privilege is asserted and a defendant complains of denial of cross-examination, it is encumbent upon the defendant to do what he can to establish whether obstructions exist within the parameters of the officer's general description of his vantage point so as to show cross-examination is critical to his defense. (*Montgomery, supra*, 205 Cal.App.3d at p. 1020 [defendant must show how the information affected the presentation of his defense]; *Anderson, supra*, 607 A.2d at p. 496 ["[T]he determination whether disclosure of a concealed observation post shall be required proceeds in two stages. First, the defendant must make a threshold showing of

---

2 The People assert that on appeal, appellant cannot raise claim a denial of due process as he made no objection on that ground in the trial court. We reject the claim. The constitutional issue was raised when appellant argued during the hearing that he was entitled to cross-examination and disclosure.

need for the information; he must establish 'that he needs the evidence to conduct his defense and that there are no alternative means of getting at the same point.' . . ."].)

Here, defense counsel did not present photographs or a layout of South Main Street to the trial court demonstrating potential obstructions. Counsel did not pinpoint the location of the trees and the potential parked cars on the street so that the trial court could evaluate the likelihood that the officer's view was obstructed. Defense counsel did not ascertain the configuration of the hamburger stand, how busy it was during the afternoons, and whether pedestrians walking in and out of the stand or other businesses were likely to interfere with the officer's view. Appellant did not in any fashion attempt to provide the trial court with a basis for evaluating whether the exact location of the observation post was useful to the defense.

At the hearing, appellant made no claim of a lack of identity or that he had not engaged in the transaction. Appellant did not seek to obtain exonerating testimony from Sadler or Officer Pozo's partner, and he did not testify. The defense did not assert reasons why such testimony was unavailable. Defense counsel did not test Officer Pozo's binoculars to ensure that the officer could actually see the details he claimed. Officer Pozo, on the other hand, testified to a completely unobstructed view. The officer's testimony about how the sale occurred was corroborated in part by the chase officer's discovery of the rock cocaine in Sadler's left sweater pocket and the money in small denominations in appellant's jacket pocket.

In these circumstances, appellant failed to show at the threshold that there was a reasonable possibility that further testing of the officer's ability to see what he claimed might lead to his exoneration. It is not enough in cases where the privilege is asserted to claim that the defendant has a right to cross-examination during that proceeding. In essence, that is all that appellant has claimed here. Because the defense failed to do everything possible to make the threshold showing that the cross-examination in question was critical to defending against the allegation of the violation, the trial court properly exercised its discretion by finding disclosure was not required. In other words, appellant failed to show materiality.

Appellant argues that some of the surveillance post disclosure cases state the wrong standard for determining "materiality." He points to a discussion in *Walker*, *supra*, 230 Cal.App.3d 230, 237-238, where the court commented on "materiality" as follows: "In discussing the concept of materiality requiring disclosure of informant's identity, the California Supreme Court held: 'The defendant's "burden extends only to showing that 'in view of the evidence, the informer would be a material witness on the issue of guilt and nondisclosure of his identity would deprive the defendant of a fair trial.' [Citation.] 'That burden is discharged, however, when defendant demonstrates a reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration.' . . . " [Citation.]' (*Price v. Superior Court* (1970) 1 Cal.3d 836, 843 [(*Price*)].) As stated above, the informant's identity and surveillance location issues are analogous; therefore, we hold that this is the appropriate standard for determining the materiality of a surveillance location. In this case, defendant has the burden of showing that in view of the evidence, there was a reasonable possibility that the location could constitute material evidence on the issue of guilt which *would* result in his exoneration." (Italics added.)

Appellant asserts that by changing the word "might" in the *Price* standard of materiality to "would," the *Walker* court improperly increased the burden on the defense to show entitlement to disclosure. We think that appellant's argument amounts to nothing but an immaterial difference in semantics.

We have reviewed the decisions in *Haider, supra*, 34 Cal.App.4th 661, *People v. Garza* (1995) 32 Cal.App.4th 148, *In re Sergio M.* (1993) 13 Cal.App.4th 809, *Montgomery, supra*, 205 Cal.App.3d 1011, *Hines v. Superior Court* (*People*) (1988) 203 Cal.App.3d 1231, and *Walker*, *supra*, 230 Cal.App.3d 230. Each case stated the general standard for disclosure properly, albeit in slightly different terms. We conclude that after balancing, the ultimate question is whether fairness requires that the People's privilege yield to the defense's right to cross-examination. As we stated above in summarizing the proper standards for disclosure, whether disclosure is required is determined on a case-by-case basis and is dependent upon the evidence presented at the hearing. Materiality is

properly defined in *Price* and *Walker*. It does not matter whether the materiality standard utilizes the word "might" or the word "would" because the operative phrase in the test is "a reasonable possibility." What is required is that there is a *reasonable possibility* that the disclosure will lead to the defendant's exoneration.

Appellant also argues that under the *Price* formula for materiality, he is entitled to disclosure. Again, we disagree. Without the assertion of the privilege, his proposed cross-examination would have been "material" under the ordinary standards for permitting cross-examination. However, once the covert surveillance post privilege was sustained, the finding of "materiality" was subject to different criteria. The defense must put forward some evidence showing a need for requiring disclosure, and the trial court then balances the parties' interests in disclosure. (*Montgomery, supra*, 205 Cal.App.3d at pp. 1020-1023.) The result of the balancing test is also called "materiality." (*Id*. at p. 1020.) We assume from the record that when the trial court stated that it did not find the cross-examination was "material," it was referring to the latter determination and not the former. Again, because appellant did not do everything he could to demonstrate a need for disclosure, the trial court's ultimate ruling on materiality is supported by the evidence at the hearing.

Appellant appears to be making the same argument to this court that the defendant raised in *Walker*. The *Walker* court commented that the defendant's position in that case was that a surveillance post's location is always material, and accordingly, the judgment must be reversed because the trial court failed to strike the officer's testimony. (*Walker, supra*, 230 Cal.App.3d at p. 237.) We agree with that court's observations in *Walker*: we will not dismiss probation violation proceedings in every case where the surveillance post privilege is asserted; a defendant must show a reasonable possibility that his defense is affected before disclosure is required. (*Ibid*.)

III. We Have Reviewed the Sealed Reporter's Transcript of the In Camera Hearing.

As part of the above contention, appellant additionally requests that this court review the sealed reporter's transcript of the in camera hearing so as to assure that the

trial court conducted an adequate inquiry on the issue of disclosure.[3] We have conducted such a review.

Appellant explains that by making his request for in camera review, he wants us to determine if the trial court in camera properly complied with the procedural steps set forth for a determination of disclosure in *Montgomery, supra*, 205 Cal.App.3d at p. 1021. There, the court required the following.

"The correct procedure in these cases is for the court first to ask the defendant to make a prima facie showing for disclosure. (*People* v. *Ingram* (1978) 87 Cal.App.3d 832, 838, 842; see *People* v. *Martin* (1969) 2 Cal.App.3d 121, 127.) If defendant does so, the court should then proceed under section 915 and hold an in camera hearing attended by the party claiming the privilege . . . . The defendant should be given an opportunity to propose questions to be asked at this hearing. The in camera hearing is a preliminary inquiry into whether the claim of privilege should be upheld. If the People succeed in camera, the adversary process should be utilized, 'probing the information's relevance to the defense, exploring with counsel the availability of other alternatives, and, if necessary, hearing testimony *voir dire*.' ([*People v. Superior Court* (*Biggs*) (1971)] 19 Cal.App.3d [522,] 531.) The hearing should conclude with the trial court making findings sufficient to enable the appellate court to review its decision. (*Parnes* v. *Superior Court* (1978) 81 Cal.App.3d 831, 835-836.) [(Fns. omitted.)]" (*Montgomery, supra*, 205 Cal.App.3d at p. 1021.)

---

[3] Section 915, subdivision (b), provides as follows: "(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) . . . and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers."

Here, on-the-record in camera, the trial court considered only the issue of whether there was a sufficient evidence to sustain the privilege. The trial court made no other inquiry during that hearing.

Appellant's comments in his brief lead us to infer that if he was aware of the narrow inquiry conducted in camera, he would complain that the trial court failed to make the full inquiry mandated by the court in *Montgomery*. Our record discloses that the trial court did not comply with the requirements for the explicit findings set forth in *Montgomery*. Despite the trial court's failure to make a more complete record of the reasoning supporting its rulings, we find no error.

The findings the *Montgomery* court requires are not in camera findings. They are findings in large part that are required to be made on the record in open court. Because we find that appellant's threshold efforts are insufficient to show a violation of due process, the trial court was under no further obligation to conduct the more complete, on-the-record inquiry required by *Montgomery* and to make further explicit findings. The trial court properly exercised its discretion in camera by simply ascertaining the facts underlying the assertion of the privilege and then sustaining the privilege on the record and making the on-the-record finding of no "materiality." In this case, the record is sufficient for appellate review. Appellant was afforded due process in camera and at the hearing in open court.[4]

---

[4] Even if we found a denial of fundamental fairness or improper findings in this case, appellant would not be entitled to a dismissal of the proceedings with prejudice. A reversal of the judgment would only result in a remand to the trial court so it could once again in conformity with the requirements of due process and the findings required by the *Montgomery* court, determine whether appellant violated probation. In addition to the evidence that appellant committed a new, unrelated criminal offense, the record demonstrates that he was not reporting as required to his probation officer, he had not registered as a narcotics offender, he was frequenting a place where narcotics were being sold, and he was associating with a known narcotics user. Also, on remand, the trial court might in the circumstances find good cause for dispensing with the right against cross-examination with regard to the exact location of the observation post. We think that it is unlikely even if we reversed the judgment that appellant would avoid the revocation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, P. J.

BOREN

_____, J.

DOI TODD